Nos. 76-711, 76-5691, and 76-5715

In the Supreme Court of the United States

OCTOBER TERM, 1976

BENJAMIN MICHAEL FELICIANO AND
JESSE DAVIDSON, PETITIONERS

v.

UNITED STATES OF AMERICA

NICHOLAS ANTHONY IACONA, PETITIONER

v.

UNITED STATES OF AMERICA

EDWARD BISHOP AND
LOUIS J. SUMMA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

CITATIONS

Cases:

Page

Cases continued:

Page

Statutes:

Miscellaneous:

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OPINION BELOW

The opinion of the court of appeals (Feliciano Pet. App. 1A-11A)[1] is reported at 544 F. 2d 156.

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[1]"Feliciano Pet." refers to the petition in No. 76-711. "Iacona Pet." refers to No. 76-5691. "Bishop Pet." refers to No. 76-5715.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1976. The petitions for a writ of certiorari were filed on November 15, 1976 (No. 76-5691), November 18, 1976 (No. 76-5715), and November 20, 1976 (No. 76-711). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are set out at Feliciano Pet. App. 12A-16A.

QUESTIONS PRESENTED

1. Whether the sports bribery statute, 18 U.S.C. 224, applies to horse racing (petitioners Feliciano and Davidson).

2. Whether the evidence was sufficient to support petitioners' conviction of conspiracy to commit sports bribery (petitioners Feliciano and Davidson).

3. Whether the evidence was sufficient to support petitioners' Travel Act convictions (petitioners Feliciano and Davidson).

4. Whether knowledge that interstate communications facilities have been used is an element of wire fraud (petitioners Feliciano and Davidson).

5. Whether the trial court erred in instructing the jury on the wire fraud counts of the indictment (petitioners Feliciano and Davidson).

6. Whether the evidence was sufficient to support petitioners' convictions of conspiring to make fraudulent representations to the Internal Revenue Service (all petitioners).

7. Whether the trial court abused its discretion in denying petitioners' motions for severance (petitioners Summa, Iacona and Bishop).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, all petitioners were convicted of conspiring to make fraudulent representations to the Internal Revenue Service, in violation of 18 U.S.C. 371 and 26 U.S.C. 7206(2). In addition, petitioners Feliciano and Davidson were convicted of conspiracy to commit sports bribery, in violation of 18 U.S.C. 224; of two counts of causing interstate travel to distribute the proceeds of an unlawful activity, in violation of 18 U.S.C. 1952 and 2; and of three counts of wire fraud, in violation of 18 U.S.C. 1343. Petitioners Iacona, Summa and Bishop were sentenced to three years' imprisonment, suspended in favor of three years' probation. Petitioners Feliciano and Davidson were sentenced to concurrent terms of three years' imprisonment and fined a total of $7,000 each; all but six months of the imprisonment was suspended in favor of three years' probation. The court of appeals affirmed.

The evidence at trial established that on February 14, 1975, a group of jockeys, including petitioners Feliciano and Davidson, combined their efforts to bring about a particular winning combination in the "Triple"[2] in the ninth race at Bowie Race Track in Bowie, Maryland (Feliciano Pet. App. 4A).

Petitioners Davidson and Feliciano, co-defendants Eric Walsh and Luigi Gino, and unindicted co-conspirators John Baboolal and Carlos Jimenez were among the twelve jockeys scheduled to ride in the ninth race at Bowie. These jockeys contributed $680 to a fund used to purchase 38

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[2]To win the "Triple" wager a bettor is required to select, in order, the three horses finishing first, second, and third (*ibid.*).

"box" tickets[3] on a three-horse combination in the Triple.[4] This combination did not include any of the horses being ridden by the jockeys participating in the betting (Tr. 24-26, 775-776); they planned, however, to hold back their horses, thus causing the other horses in the race to finish ahead.

The Triple was won by the three horses on which they had wagered. After the race Gino distributed the 38 winning tickets, each worth more than $900, among the participating jockeys (Tr. 91, 565). Unfortunately for petitioners, however, supervisors at the race track noticed an unusual betting pattern, and the track stewards concluded that some of the jockeys had handled their horses in an irregular manner. They began to investigate the race (Tr. 55-57, 154-162).

After Hedy Sue Way, a friend of Gino's, unsuccessfully attempted to cash two of the winning tickets for Gino on the day following the race, the jockeys decided to collect all the tickets and have them cashed through jockey Eric Walsh's agent, William Vuotto (Tr. 248-252, 94, 97, 566-567, 796, 800). Gino informed Way that "they were bringing in two men from Pennsylvania" to cash the tickets (Tr. 257, 306).

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[3]The standard Triple ticket costs three dollars. For $18 patrons may purchase a "box" ticket, which covers the selected three horses regardless of the order of finish. Since a "box" ticket contains all six possible orders of finish for any three horses, it necessarily includes not more than one winning three dollar wager and at least five losing three dollar wagers. See Feliciano Pet. App. 4A.

[4]Petitioner Feliciano had approached Jimenez and asked him if he liked his horse in the ninth race. Jimenez answered that he did, and Feliciano asked Jimenez if he wanted to "pull" the horse (Tr. 83-84). Jimenez agreed to do so, and his valet subsequently gave Feliciano $90. Immediately before the ninth race Jimenez told Gino that "my money is in," and Gino responded by telling Jimenez the number of the three horse combination on which the wager had been placed (Tr. 85-86).

The services of these "ten percenters"[5] were procured by Vuotto at the request of Walsh (Tr. 341). On February 18, 1975, Vuotto, from his home in Maryland, telephoned petitioner Bishop in Delaware (Tr. 343-345). In that conversation, and in a second conversation the following day, Bishop agreed to provide someone to cash the tickets (Tr. 345-346). Vuotto subsequently delivered the tickets to Bishop, and petitioners Iacona and Summa attempted to redeem them at the race track, claiming that they were the owners of the tickets. They were unsuccessful, however, and departed with the tickets (Tr. 406-407, 410-415). The tickets were returned through Bishop and Vuotto to Walsh (Tr. 349-350). Walsh and Feliciano then burned the tickets (Tr. 691).

ARGUMENT

1. Petitioners Feliciano and Davidson assert that 18 U.S.C. 224, which proscribes bribery in any "sporting contest," does not apply to horse races (Feliciano Pet. 16-17).

The term "sporting contest" is defined by Section 224 (c)(2) as "any contest in any sport, between individual contestants or teams of contestants * * *." Petitioners' argument that horse racing is not a sporting contest because horses are not "individual contestants" is insubstantial. The horses are individual contestants, and the jockeys are undeniably "individuals" who are an essential part of the contest. See *United States* v. *Pinto*, 503 F. 2d 718, 724 (C.A. 2).

2. There was ample evidence to support the convictions of Feliciano and Davidson of conspiracy to commit sports bribery. The jockeys pooled purchase money for the winning tickets, the tickets were jointly purchased, and after

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[5]A "ten-percenter" is one who, for a fee amounting to ten percent of the winnings, cashes tickets for others and completes the required Internal Revenue Service form. See *United States* v. *Lincoln*, 472 F. 2d 1183 (C.A. 5).

the race a joint effort was made to cash the tickets. There was direct evidence that Carlos Jimenez agreed to hold up his horse in exchange for being allowed to join in the betting pool (Tr. 83-86); this exchange of money was a bribe just as if the other jockeys had paid Jimenez a fixed sum of money to hold back his mount. Petitioners offered Jimenez something of value—a share in any winnings—in exchange for his promise not to compete properly. It should make no difference whether or not the persons offering the inducement are fellow competitors (a boxer could bribe his opponent to "take a dive") and whether or not the inducement is a definite sum (in the case of the boxer, as here, the inducement may be a portion of the winnings). The evidence that the participating jockeys agreed with each other to influence the race by inhibiting their horses and to profit by wagering on the selected combination therefore supports the conviction.[6] See *United States* v. *Gerry*, 515 F. 2d 130, 134-136 (C.A. 2), certiorari denied, 423 U.S. 832.

The argument (Feliciano Pet. 14-15) that the evidence did not establish the interstate commerce element of 18 U.S.C. 224 is incorrect. The jockeys embarked upon a plan to make a profit by generating and cashing winning tickets. A conspiracy of this sort encompasses the means used to achieve its objectives, and here those means included the jockeys' efforts to obtain the fruits of their crime. See *United States* v. *Reynolds*, 511 F. 2d 603, 607 (C.A. 5); *United States* v. *Iacovetti*, 466 F. 2d 1147, 1153

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[6]There is consequently nothing to the assertion (Feliciano Pet. 7-10) that the trial court erred in instructing the jury that the conspiracy to commit sports bribery could be established by proof of a conspiracy to bribe "jockeys" rather than requiring a finding of a conspiracy specifically to bribe Jimenez. The jockeys offered inducements to each other, and a bribe occurred each time another jockey agreed to take part in the venture.

(C.A. 5). Those efforts involved a "scheme in commerce," because the statute defines that term as "any scheme effectuated in whole or in part through the use in interstate * * * commerce of any facility for transportation or communication" (18 U.S.C. 224(c)(1)).

3. Petitioners Feliciano and Davidson contend that their convictions under the Travel Act, 18 U.S.C. 1952, should be set aside because the evidence did not show that they knew that interstate travel was to be used in distributing the bribery proceeds and because the interstate travel involved was not intended to "distribute" the bribery proceeds (Feliciano Pet. 21-23).

The Travel Act, however, does not require a "knowing" use of facilities in interstate commerce. See *United States* v. *LeFaivre*, 507 F. 2d 1288, 1297 (C.A. 4), certiorari denied, 420 U.S. 1004; *United States* v. *Colacurcio*, 499 F. 2d 1401 (C.A. 9). The only knowledge or intent required by the Travel Act is "intent to * * * distribute the proceeds of any unlawful activity." 18 U.S.C. 1952 (a)(1).

a. The fact that petitioners did not themselves participate in the interstate travel is immaterial. This Court held in *United States* v. *Feola*, 420 U.S. 671, 696, that "where knowledge of the facts giving rise to federal jurisdiction is not necessary for conviction of a substantive offense embodying a *mens rea* requirement, such knowledge is equally irrelevant to questions of responsibility for conspiracy to commit that offense." One who aids or abets an unlawful activity need only share the same criminal intent as the principal, see *Snyder* v. *United States*, 448 F. 2d 716, 718 (C.A. 8), and under the Travel Act a person may be guilty of aiding and abetting the offense without knowledge of the use of interstate facilities. *United States* v. *LeFaivre, supra; United States* v. *Villano*, 529 F. 2d 1046 (C.A. 10), certiorari denied, June

21, 1976 (No. 75-1349). Petitioners Feliciano and Davidson, who caused petitioners Bishop, Iacona and Summa to travel interstate, do not escape responsibility because they did not know where the "ten percenters" would come from.

United States v. *Barnes*, 383 F. 2d 287 (C.A. 6), certiorari denied, 389 U.S. 1040, held that, although the actual user of interstate facilities need not know of the federal jurisdictional element, some showing of knowledge was required to convict those charged as co-conspirators or as aiders and abettors. The Sixth Circuit has adhered to *Barnes* even after *Feola*, and has held that, to be guilty of a conspiracy to violate the Travel Act, or as an aider or abetter of a Travel Act violation, the defendant must have known that interstate facilities would be used. *United States* v. *Prince*, 529 F. 2d 1108 (C.A. 6). Cf. *United States* v. *Eisner*, 533 F. 2d 987, 990 n. 3 (C.A. 6), certiorari denied, November 1, 1976 (No. 76-31) (summarizing *Barnes* and *Prince* as holding that "each defendant must have reason to know of the use of an interstate facility").

We believe that *Prince* was wrongly decided. We recognize that it appears to conflict with *LaFaivre* and, if *Prince* establishes a firm rule that a person, to be guilty of aiding and abetting a Travel Act violation, must know that the principal will use interstate facilities, then it conflicts with the instant case as well. But we submit that the contours of any conflict among the circuits are not yet so well established that resolution by this Court is appropriate.[7]

Prince appears to be internally inconsistent. Although seemingly erecting a requirement of knowledge for a conspirator or aider and abettor, it states (529 F. 2d at 1112)

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[7] Moreover, the sentences of imprisonment on the Travel Act counts run concurrently with petitioners' sentences on the other four counts. Although petitioners were fined $3,000 on the Travel Act counts, the existence of a fine is not ordinarily sufficient to call for plenary review by this Court.

that if a person actually "causes" interstate travel, he need not know of the presence of the jurisdictional element of the Travel Act to have committed the substantive offense. This divergence of treatment is inconsistent with the rationale of *Feola*. The court in *Prince* does not explain why the person charged as an aider or abettor must have a greater knowledge of the jurisdictional element of the offense than the principal. Nor does the court explain why an aider or abetter does not "cause" the travel to be committed fully as much as the principal. In the instant case, for example, Vuotto caused petitioners Iacona, Bishop and Summa to travel from Pennsylvania to Maryland, but petitioners Feliciano and Davidson caused Vuotto to cause this travel. It is possible that in a subsequent case the Sixth Circuit would conclude that causation of this sort makes it unnecessary to show that the aiders and abettors knew that the travel would be interstate.

Moreover, *Prince* neglected the ordinary rule (see *Pinkerton* v. *United States*, 328 U.S. 640) that when two or more persons engage in a joint venture, each of them is responsible, as a principal, for any substantive crimes committed by the others in furtherance of the venture. Petitioners Feliciano and Davidson therefore stand in the shoes of Vuotto, who clearly had the requisite knowledge. In *Feola* itself, the Second Circuit relied on this principle to hold Feola responsible as a principal for the substantive crime of assault on a federal officer, despite the court of appeals' assumption that knowledge of the jurisdictional requirement was an element of the conspiracy to commit that offense. *United States* v. *Alsondo*, 486 F. 2d 1339, 1346 (C.A. 2), reversed in part on other grounds *sub nom. United States* v. *Feola*, 420 U.S. 671. It seems reasonable to suppose that, given the opportunity for further reflection, the Sixth Circuit would conclude that the prosecution need not prove that persons similarly situated to petitioners Feliciano and Davidson had knowledge of the use of interstate facilities.

b. Petitioners Feliciano and Davidson contend that the evidence was insufficient to support their Travel Act convictions because the travel of Bishop, Iacona and Summa was not intended to distribute the proceeds of the bribery.[8] The wagering tickets, however, were worthless until they were cashed, and the efforts of Bishop, Iacona and Summa to convert the tickets into cash were therefore an integral part of the effort to distribute the fruits of the criminal enterprise.

4. Petitioners Feliciano and Davidson argue that their wire fraud convictions are invalid because the evidence did not show that they knowingly used interstate communications facilities to carry out their scheme, and that the evidence was insufficient to establish that they "knowingly" caused the use of such facilities in carrying out their scheme to defraud (Feliciano Pet. 23-24).

This contention is insubstantial. The wire fraud statute punishes "[w]hoever, having devised * * * any scheme or artifice to defraud * * * transmits or causes to be transmitted by means of wire * * * in interstate or foreign commerce, * * * for the purpose of executing such scheme * * * ." 18 U.S.C. 1343. "[T]here is no requirement under 18 U.S.C. §1343 that the accused know that instrumentalities of interstate communication are used or foresee that such instrumentalities may be used." *United States* v. *Blassingame*, 427 F. 2d 329, 331 (C.A. 2), certiorari denied, 402 U.S. 945.[9]

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[8]Petitioners Feliciano and Davidson maintain (Feliciano Pet. 21) that the use of telephone facilities was too minimal to establish the federal jurisdictional element in the Travel Act counts. See *Rewis* v. *United States*, 401 U.S. 808. The use of telephone facilities, however, was not the sole basis of the Travel Act counts. These counts alleged that Bishop, Iacona and Summa traveled interstate to obtain and to distribute the proceeds of the sports bribery.

[9]Petitioners mistakenly rely on *United States* v. *Maze*, 414 U.S. 395. In *Maze* the Court considered the provisions of the mail fraud statute, 18 U.S.C. 1341, which, unlike the statute in question here, specifically requires that the use of the mails be "knowingly cause[d]."

5. Petitioners Feliciano and Davidson also assert (Feliciano Pet. 10-12) that the trial court erred in refusing to instruct the jury that conviction on the wire fraud counts required a finding that the jockeys intended to "fix" the race.

The basis of the offense alleged in the wire fraud counts was not the jockeys' intent to "fix" the race; it was, rather, the breach of their fiduciary duty to their employers and to the track, and the breach was demonstrated by proof that they placed wagers on horses they were not riding.[10] Proof of a violation of the wire fraud statute does not require evidence that a deceptive scheme was intended to defraud persons of money. See *United States* v. *Brown*, 540 F. 2d 364, 374 (C.A. 8). A deceptive scheme violates the statute if it deprives persons of significant intangible rights, including the right to honest fiduciary services. See *United States* v. *Isaacs*, 493 F. 2d 1124, 1149-1150 (C.A. 7), certiorari denied, 417 U.S. 976 (right of Illinois citizens to honest and faithful services of governor); *United States* v. *George*, 477 F. 2d 508, 512-513 (C.A. 7), certiorari denied, 414 U.S. 827 (right of corporation to faithful services of employee).

The trial court's instructions correctly stated these principles. They required the jury to find that petitioners had a fiduciary relationship to the owners or trainers of the horses they rode, or to the state racing commission, or to the bettors; that they breached that relationship by purchasing tickets on competing horses; and that they intended some actual harm to those to whom they had a fiduciary relationship (Tr. 955).

6. Petitioners argue that there was no evidence that they knew of the Internal Revenue Service (IRS) rule

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[10]At the time in question, the Maryland Thoroughbred Rules of Racing §09.10.20.13 provided in pertinent part that "no jockey shall bet on any race except * * * on the horse which he rides."

requiring the reporting of the identity of the actual winners of large wagers that are collected. Therefore, they maintain, the evidence was insufficient to support their convictions for conspiring to make false representations to the IRS (Feliciano Pet. 18-20; Iacona Pet. 4; Bishop Pet. 5-10).

This contention was properly rejected by the court of appeals (Feliciano Pet. App. 9A-10A). There was ample evidence of knowledge. The daily racing program at Bowie carried an explicit notification that the identity of the actual owner of tickets paying $900 or more on a $3 wager was required to be provided to the IRS (Tr. 508) and thus "the jury could fairly infer that the jockeys as well as habitues of the track were aware of the tax law requirements" (Pet. App. 9A). Indeed, the fact that petitioners Iacona and Summa falsely represented that they were the owners of the tickets, and the evidence that the non-jockeys were to receive a 10-percent fee for cashing the tickets (Tr. 348), supports the conclusion that they were aware of the illegal nature of their actions. Moreover, petitioner Feliciano admitted at trial that he knew it was his obligation as the true owner to fill out the tax form (Tr. 688).[11] See *United States* v. *Dumaine*, 493 F. 2d 1257 (C.A. 1).

7. Petitioners Iacona, Summa and Bishop urge that the evidence established the existence of separate conspiracies and, relying on *Kotteakos* v. *United States*, 328

[11]Petitioners' contention that only the identity of the recipient of the payment is required, absent a specific demand for information about the "actual owner," has been rejected by every court of appeals to consider the question. *United States* v. *Dumaine*, *supra*; *United States* v. *Haimowitz*, 404 F. 2d 38 (C.A. 2); see also *United States* v. *Lincoln*, 472 F. 2d 1183 (C.A. 5).

U.S. 750, contend that the trial court therefore erred in denying their motions for severance (Iacona Pet. 3-4; Bishop Pet. 10).

A motion for severance is addressed to the sound discretion of the trial court, *Opper* v. *United States*, 348 U.S. 84, 95, and the district court's action will not be set aside absent clear evidence of prejudice. *Schaffer* v. *United States*, 362 U.S. 511; *United States* v. *Catina*, 500 F. 2d 1319, 1326 (C.A. 3), certiorari denied, 419 U.S. 1047. There was no abuse of discretion here. As the court of appeals properly held, the evidence established a conspiracy among all petitioners with the object of cashing the winning tickets while concealing the identity of the beneficiaries (Feliciano Pet. App. 8A). See *United States* v. *Cobb*, 446 F. 2d 1174 (C.A. 2), certiorari denied, 404 U.S. 984. A joint trial was therefore proper.

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

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FEBRUARY 1977.

DOJ-1977-02